Supreme Court, U.S.
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No. 85-2109

In The
Supreme Court of the United States
October Term, 1985

LERAKOLI, INC.; LONDON STAR, NEW YORK, INC.; TACHE ET CIE, S.A.; LIEBER & SOLOW, INC.; SOUCOL, LTD.; ROUGH DIAMOND TRADERS, INC.; and SEVEN EIGHTEEN FIFTH AVENUE CORP.,

Petitioners,

v.

PAN AMERICAN WORLD AIRWAYS, INC.,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JOHN N. ROMANS
Counsel of Record
ROBERT S. LIPTON
101 Park Avenue
New York, New York 10178-0061
(212) 696-6000
Attorneys for Respondent, Pan American World Airways, Inc.

Of Counsel:

CURTIS, MALLET-PREVOST, COLT & MOSLE
DONALD L. SHUCK, JR.

August 15, 1986

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or call collect (402) 342-2831

COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Was the court below correct in applying federal common law to a dispute concerning whether an international mail carrier is entitled to the benefit of the limits of liability contained in the Lausanne Convention, which governs the international carriage of mail?

2. If federal common law is not applicable to the dispute in question, did the court below have subject matter jurisdiction over a non-diverse party pursuant to the principles of pendent jurisdiction, where the action was removed from a state court, where the basis of the removal was federal question jurisdiction over another party, and where the action is based upon a single nucleus of operative facts?

3. If federal common law is applicable to the dispute in question, was the court of appeals correct in holding that "[u]nder federal law relating to the carriage of goods, the party asserting a conversion claim has the burden of establishing that the carrier was responsible for the loss due to some willful or intentional conduct on its part"?

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LERAKOLI, INC.; LONDON STAR, NEW YORK, INC.; TACHE ET CIE, S.A.; LIEBER & SOLOW, INC.; SOUCOL, LTD.; ROUGH DIAMOND TRADERS, INC.; and SEVEN EIGHTEEN FIFTH AVENUE CORP.,

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Respondent, Pan American World Airways, Inc. ("Pan Am"),[1] respectfully submits this brief in opposition to Petitioners' Petition for a Writ of Certiorari.

[1]Respondent's designation of corporate relationships pursuant to Rule 28.1 of the Rules of this Court is as follows: Pan Am is a wholly-owned subsidiary of Pan Am Corp., a Delaware corporation.

INTRODUCTION

Petitioners assert that their petition should be granted on the grounds that the instant action involves significant issues with respect to: (1) the exercise of pendent-party jurisdiction; (2) the creation of federal common law; and (3) the applicability to an allegedly negligent agent of a statutory limitation of liability under federal common law. Petitioners further contend, with respect to each of these issues, that the Second Circuit's ruling herein is contrary to a decision of this Court. (P. 4)[2]

As will be demonstrated below, the Second Circuit's holding on each of the foregoing issues is based upon, and is entirely consistent with, this Court's prior decisions. Moreover, in asserting both their questions presented and their argument, Petitioners frame the substantive common law issue in terms of the law applicable to negligent agents, while conveniently ignoring settled federal common law relating to the burdens which must be overcome in order to prevail upon a claim arising out of international carriage by air or sea. Similarly, Petitioners neglect to indicate that their pendent-party jurisdiction argument was raised for the first time in a motion for rehearing in the court of appeals and was summarily rejected.

In short, this case presents no unusual questions, no conflict with established authority, and no reason to burden this Court's calendar.

———o———

[2]References in the form "P. —" are to the Petition for Certiorari herein.

POINT I

THE FEDERAL COURTS HAVE SUBJECT MATTER JURISDICTION OVER THIS ACTION

Petitioners apparently accept the settled rule that the federal courts have "federal question jurisdiction" over actions decided under federal common law. *See, e.g., National Farmers Union Ins. Co. v. Crow Tribe of Indians,* — U.S. —, —, 105 S. Ct. 2447, 2451 (1985); *Illinois v. City of Milwaukee,* 406 U.S. 91, 100 (1972). Faced with this settled doctrine, Petitioners nevertheless assert that the federal courts lack subject matter jurisdiction over this action *vis-a-vis* Pan Am because: (a) the lower courts improperly applied federal common law to Petitioners' claim against Pan Am; and (b) there is no other foundation—including pendent jurisdiction—upon which subject matter jurisdiction may be based.[3] Petitioners are wrong on both counts.

A. The Courts Below Properly Applied Federal Common Law To The Dispute Between Petitioners And Pan Am

Although Petitioners repeat the oft-quoted statement in *Erie Railroad Co. v. Tompkins,* 304 U.S. 64, 78 (1938) that there is "no federal general common law," there is no question that this Court has applied federal common law in various circumstances. *See Banco Nacional de Cuba v. Sabbatino,* 376 U.S. 398 (1964); *Clearfield Trust Co. v. United States,* 318 U.S. 363 (1943). The very cases

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[3]This action was removed from the New York State courts to the United States District Court for the Eastern District of New York pursuant to 28 U.S.C. § 1441.

upon which Petitioners rely, *Texas Industries, Inc. v. Radcliffe Materials, Inc.*, 451 U.S. 630 (1981) and *Wallis v. Pan American Petroleum Corp.*, 384 U.S. 63 (1966), recognize both the existence and application of federal common law.

In *Texas Industries, Inc.*, this Court endorsed the application of federal common law to disputes touching upon the duties of the United States or interstate or international relations—matters which are clearly present here.

> [O]ur federal system does not permit the controversy to be resolved under state law, either because the authority and duties of the United States as sovereign are intimately involved or because the interstate or international nature of the controversy makes it inappropriate for state law to control. [451 U.S. at 641; footnotes omitted].

The Second Circuit was undoubtedly relying upon the rule in *Texas Industries, Inc.*, when it applied the Lausanne Convention[4] to the instant dispute and held that "[i]nternational mail delivery is regulated exclusively under federal law. Such a scheme necessarily calls for uniform liability standards." (783 F.2d at 37; A. 10).[5]

In addition, the Second Circuit specifically relied upon *Wallis v. Pan American Petroleum Corp., supra*, in holding that " 'before federal common law rules should be fashioned, the use of state law must pose a threat to an "identifiable" federal policy.' " (783 F.2d at 37; A. 9). It was for the very reasons articulated in *Wallis* that the

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[4]The Lausanne Convention is formerly known as the Universal Postal Union, 27 U.S.T. 345, T.I.A.S. No. 8231, entered into force January 1, 1976.

[5]References in the form "783 F.2d at —" are to the Second Circuit opinion herein, *Lerakoli, Inc., et al. v. Pan American World Airways, Inc.*, 783 F.2d 33 (S.D.N.Y. 1986). References in the form "A. —" are to the Appendix to the Petition for Certiorari herein.

Second Circuit found federal common law applicable to this action:

> [T]he federal interest in maintaining a uniform scheme of regulation of international mail requires the application of uniform liability standards for claims arising from the nondelivery of the mail. [783 F.2d at 37; A. 9-10].

Moreover, the Second Circuit's decision also conforms with this Court's decision in *Miree v. DeKalb County*, 433 U.S. 25 (1977), which Petitioners also cite. Relying upon its earlier decision in *Clearfield Trust Co. v. United States*, 318 U.S. 363 (1943), the Court in *Miree* found that the application of federal common law is appropriate where resolution of the claim in question would have a direct effect on the United States or its treasury. 433 U.S. at 29. In the instant action, the Second Circuit found that a failure to apply federal common law to Petitioners' claim against Pan Am would have just such an effect.

> The implications of failing to extend the Lausanne Convention provision to agents of the USPS [United States Postal Service] are no less severe. While the record reveals nothing to suggest that the USPS would be compelled to indemnify Pan Am for any recovery in this instance, it is beyond speculation that a limited interpretation of the Lausanne Convention would have a major influence on the USPS's ability to contract with airlines for the carriage of mail in the future. At the very least, air carriers would demand higher rates from the USPS for this service, with such added government costs then being passed on to the public in the form of higher postage prices. This, in turn, would be in conflict with the obvious intent of Article 44: to limit the financial repercussion of the nondelivery of registered mail on the gov-

> ernment agency. Accordingly, Article 44 must be extended to cover the claims against Pan Am. [783 F.2d at 36-37; A.8; footnote omitted].

Finally, apparently recognizing that the Second Circuit's application of federal common law to the case at bar is completely consistent with this Court's prior rulings, Petitioners suggest that the Second Circuit's decision is inconsistent with its own earlier ruling in *In re "Agent Orange" Product Liability Litigation*, 635 F.2d 987 (2d Cir. 1980), *cert. denied*, 454 U.S. 1128 (1981). This suggestion is also incorrect.

In *Agent Orange*, the Second Circuit declined to apply federal common law to the claims of Vietnam veterans who alleged that they were injured in the line of duty by chemical defoliants produced by the defendants. In reaching that conclusion the Second Circuit relied on the *absence* of two factors, *both of which are present* here. First, in *Agent Orange* the Second Circuit noted that the United States was not a party to the action; here it is a party in the person of the United States Postal Service. Second, the *Agent Orange* court noted that the case did not involve a "federal regulatory scheme"; here such a scheme is clearly present.

In the case at bar, the Second Circuit based its opinion largely upon the existence of such a regulatory scheme.

> Here, the Lausanne Convention, as part of the federal regulatory framework for the handling of international mail, prescribes some of the terms to which a sender of registered mail agrees when delivering a parcel to the USPS for transport. These terms form the equivalent of a contractual agreement between the sender and the USPS limiting the liability

> of the USPS, and, pursuant to agency principles, that limitation is passed on to any party performing services for the USPS.
>
> The nature of air mail carriage under federal law compels this conclusion. While the USPS is empowered to contract with air carriers of mail where present systems are inadequate, 39 U.S.C.A. § 5402 (West Supp. 1985), air carriers also may be conscripted to provide "necessary and adequate facilities and service for the transportation of mail" pursuant to the provisions of their certificates of public convenience and necessity. 49 U.S.C.A. §§ 1371, 1375 (West Supp. 1985). It would be unjust indeed to require air carriers, as a condition of their operation, to perform services otherwise the responsibility of the USPS while at the same time denying them the benefit of the USPS's liability limitation. [783 F.2d at 36; A. 6-7; footnotes omitted].

In sum, the Second Circuit's application of federal common law to the case at bar squares precisely with well-settled principles set forth in this Court's prior decisions. Since the existence of a federal common law question vests the federal courts with subject matter jurisdiction pursuant to 28 U.S.C. § 1331, Petitioners' remaining subject matter jurisdiction arguments, even if they were correct, which they are not, would be moot. Certiorari should be denied on this ground alone.

B. Assuming Arguendo That Federal Common Law Is Not Applicable To The Instant Action, The Lower Courts' Exercise Of Subject Matter Jurisdiction Was Proper Pursuant To Principles Of Pendent Jurisdiction

As the second prong of their subject matter jurisdiction argument, Petitioners assert that if federal common law is,

in fact, inapplicable to the instant controversy, federal jurisdiction would be lacking and, therefore, this matter should be remanded to the New York State courts. In this regard, Petitioners recognize that there are two potential bases for subject matter jurisdiction in addition to "federal question" jurisdiction—pendent party jurisdiction and jurisdiction pursuant to the "entire case" removal provisions of 28 U.S.C. § 1441(c). Petitioners assert that neither of those bases is appropriate here. Just as with their "federal question" argument, Petitioners are incorrect with respect to these arguments as well.

As a threshold matter, even if Petitioners' arguments were not devoid of merit, they would be a particularly inappropriate basis for granting certiorari. This Court will generally not consider issues which have not been raised in the lower courts. *See Lawn v. United States,* 355 U.S. 339, 362-63, n.16 (1958). Here, although Petitioners artfully avoid alluding to the treatment of their subject matter jurisdiction arguments in the courts below, the fact remains that their pendent-party and Section 1441(c) arguments were never addressed, much less decided, by either the district court or the Second Circuit. Those arguments were first raised in Petitioners' motion for reargument in the court of appeals and were summarily rejected. (A. 22).

Thus, since these contentions were not raised until after the court of appeals decision was written, there is no lower court decision for this Court to correct; there is no lower court decision in conflict with prior decisions of this Court; and there is no lower court decision which, if employed as precedent, would serve as a watershed for a body of wrongly decided law in the lower courts. In short, irrespective of the correctness of Petitioners' position, the

granting of certiorari here would serve no purpose other than to permit Petitioners to attempt to vindicate their own interests; it would lead to neither clarification nor correction of existing law.

Moreover, not only are Petitioners' pendent-party and Section 1441(c) arguments a particularly inappropriate basis for granting certiorari, they are also incorrect. *Aldinger v. Howard*, 427 U.S. 11 (1976), upon which Petitioners so heavily rely, does not support their claim that pendent-party jurisdiction over Pan Am is lacking. The Court's decision in *Aldinger* was extremely narrow. It limited its holding to a ruling that pendent-party jurisdiction could not be asserted over a state law claim against a county arising out of the same nucleus of operative facts as a federal claim brought pursuant to 42 U.S.C. § 1983, under which counties were specifically excluded as potential defendants. The reason for the decision is clear; any other result would have rendered nugatory Congressional determination that counties should not be sued in the federal courts on Section 1983 claims.

Significantly, the *Aldinger* Court took pains to indicate the extremely limited nature of its holding: "we decide here only the issue of so-called 'pendent-party' jurisdiction with respect to a claim brought under §§ 1343(3) and 1983." 427 U.S. at 18. The Court expressly declined "to lay down any sweeping pronouncement upon the existence or exercise of such [pendent-party] jurisdiction." *Id.* *Aldinger* specifically recognized the existence of numerous court of appeals decisions endorsing the very type of pendent-party jurisdiction Petitioners attack (427 U.S. at 6, n.5) and clearly left those decisions undisturbed.

Since this case does not involve 28 U.S.C. §§ 1343(3) and Section 1983, the statutes involved in *Aldinger,* and since Congress did not specifically exclude mail carriers from coverage by the Lausanne Convention (indeed, the Second Circuit found that Congress intended the Lausanne Convention to cover mail carriers, 783 F.2d at 36; A. 6), Petitioners' *Aldinger* argument is totally inapposite to the case at bar.

Petitioners' final jurisdictional argument—that there is no subject matter jurisdiction over the claim against Pan Am pursuant to 28 U.S.C. § 1441(c), which allows removal of the entire case when a removable claim is joined with an otherwise non-removable, separate and independent claim—may be quickly disposed of. *American Fire & Casualty Co. v. Finn,* 341 U.S. 6 (1951), upon which Petioners rely for the proposition that the "state claims against Pan Am are not 'separate and independent' from those against the Postal Service" (P. 6), was an action in which the removable claim was based upon diversity. Here, due to the application of the Lausanne Convention the concededly removable claim against the Postal Service is based on federal question jurisdiction. Unlike a diversity case, when a "federal question" case is removed any state claims involved are either closely enough related to be pendent and removable under 28 U.S.C. § 1441(b) or sufficiently "separate and independent" to be removable under Section 1441(c). *See* 1A J. Moore, Moore's Federal Practice ¶ 0.163[4.-5] at 339 (2d ed. 1986); 14A C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure § 3724 at 400 (2d ed. 1985). Moreover, this Court need not even reach the Section 1441(c) issue, since by virtue of the applicability of federal common law, federal question jurisdiction is clearly present here.

In sum, Petitioners' subject matter jurisdiction arguments are neither novel nor correct. They present no reason for granting the Petition.

POINT II

THE SECOND CIRCUIT CORRECTLY APPLIED SETTLED PRINCIPLES OF FEDERAL COMMON LAW TO THE INSTANT ACTION

Petitioners' final argument in support of their contention that certiorari should be granted is based upon the claim that even if federal common law is applicable to the present action, the Second Circuit departed from established principles in holding that Pan Am is entitled to the protection of the limitation of liability provisions of Article 44 of the Lausanne Convention. (P. 10). It is respectfully submitted that Petitioners' assertion is totally incorrect.

In fact, the Second Circuit relied entirely upon established precedent in concluding that the "application of Article 44 to Pan Am is appropriate in light of the reasoning of this and other courts in decisions holding that the liability limitations for air carriers under the Warsaw Convention should be extended to employees and agents of such carriers." (783 F.2d at 36; A. 7). *See, e.g., Reed v. Wiser,* 555 F.2d 1079, 1092-93 (2d Cir.), *cert. denied,* 434 U.S. 922 (1977); *Baker v. Lansdell Protective Agency, Inc.,* 590 F. Supp. 165, 170-171 (S.D.N.Y. 1984); *Julius Young Jewelry Manufacturing Co., Inc. v. Delta Air Lines,* 67 A.D.2d 148, 151, 414 N.Y.S.2d 528, 530 (1st Dept. 1979).

The Second Circuit was on equally solid precedential ground when it held that "[u]nder federal law relating to the carriage of goods, the party asserting a conversion

claim has the burden of establishing that the carrier was responsible for the loss due to some willful or intentional conduct on its part." (783 F.2d at 37; A. 8-9). *See, e.g., Glickfeld v. Howard Van Lines, Inc.*, 213 F.2d 723, 727 (9th Cir. 1954); *Insurance Company of North America v. Deutsche Lufthansa A/G and Summit Airlines, Inc.*, 18 Av. Cas. (CCH) at 18,232 (S.D.N.Y. 1984).

In the face of the Second Circuit's clear reliance upon established precedent with respect to the federal common law applicable herein, Petitioners point to *Robert C. Herd & Co., Inc. v. Krawill Machinery Corp.*, 359 U.S. 297 (1959), which held, based upon the precise language of the Carriage of Goods by Sea Act, 46 U.S.C. § 1304(5), that a stevedore is not entitled, on an agency theory, to the limitation of liability accorded to a carrier under that Act. From this holding Petitioners' attempt to jump to the conclusion that Pan Am should not be accorded the benefit of the limitation of liability provisions of the Lausanne Convention. That jump cannot be made. As the Second Circuit recognized, Pan Am is a "carrier," a stevedore is not; the carriage of mail involves responsibility for an item changing hands numerous times, stevedoring does not; the Lausanne Convention is part of an overall regulatory scheme relating to a vital government function, the Carriage of Goods by Sea Act is not.

Finally, Petitioners contend that in addition to *Herd* the Second Circuit failed to distinguish or discuss two other cases decided by this Court, *Keifer & Keifer v. Reconstruction Finance Corp.*, 306 U.S. 381 (1939), and *Sloan Shipyards Corp. v. United States Shipping Board Emergency Fleet Corp.*, 258 U.S. 549 (1922), which concern the liability of government contractors (P. 11-12). Once again,

Petitioners are incorrect. The Second Circuit specifically addressed both cases, as well as the "precise language argument" of *Herd,* in footnote 7 of its opinion:

> [Petitioners'] contentions relating to the ability of the court to extend the protection of the Lausanne Convention beyond that which is provided by the exact language of Article 44, and the inconsistency between such an expansive interpretation and principles governing the liability of independent contractors who deal with the government, are meritless. As to the limitations of statutory construction, a more restrictive approach than the one which we now take would not only affect Pan Am and other carriers, but, as we have stated, also would impact upon the USPS in the long-term. The interpretation which [Petitioners] would have us adopt, therefore, would be in direct contravention of the underlying intent of Article 44. As to the principles governing independent contractors, such cases, which deal with issues of sovereign immunity, have little application here. [783 F.2d at 37; A. 8].

In sum, Petitioners' contention that the courts below did not apply settled principles of federal common law to the case at bar is totally unfounded; it provides no basis for granting the Petition.

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CONCLUSION

Certiorari should be denied.

Respectfully submitted,

JOHN N. ROMANS
Counsel of Record
ROBERT S. LIPTON
101 Park Avenue
New York, New York 10178-0061
(212) 696-6000
Attorneys for Respondent, Pan American World Airways, Inc.

Of Counsel:
CURTIS, MALLET-PREVOST, COLT & MOSLE
DONALD L. SHUCK, JR.

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